

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN RUSH,

Plaintiff,

Case No. 15-cv-13293

Hon. Matthew F. Leitman

v.

ANTHONY SMEREKA,

Defendant.

**ORDER GRANTING PLAINTIFF'S APPLICATION TO PROCEED IN
FORMA PAUPERIS (ECF #2) AND SUMMARILY DISMISSING
PLAINTIFF'S COMPLAINT (ECF #1) WITHOUT PREJUDICE**

On September 3, 2015, Plaintiff John Rush ("Rush") filed this action against Defendants Commissioner of Social Security and Anthony Smereka ("Smereka"), an administrative law judge in the Office of Disability Adjudication and Review (the "Office") in Livonia, Michigan. (*See* ECF #1, Pg. ID 1.) Rush also filed an application to proceed in *in forma pauperis* in this action (the "Application"). (*See* ECF #2, Pg. ID 10.) Based on Rush's representations in the Application, the Court will grant him *in forma pauperis* status.

Under 28 U.S.C. § 1915(e)(2)(B), the Court is required to dismiss an *in forma pauperis* complaint *sua sponte* before service on a defendant if the Court determines that the action is frivolous or malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is

immune from such relief. A complaint is frivolous if it lacks an arguable basis in law or in fact. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

Although a pro-se litigant's complaint (like the one Rush has filed here) is to be construed liberally, *see Middleton v. McGinnis*, 860 F. Supp. 391, 392 (E.D. Mich. 1994) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)), it must nonetheless be dismissed if it fails to "plead facts sufficient to show a legal wrong has been committed from which plaintiff may be granted relief." *Goodell v. Anthony*, 157 F. Supp. 2d 796, 799 (E.D. Mich. 2001); *see also Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989) ("Neither [the Supreme Court] nor other courts [] have been willing to abrogate basic pleading essentials in pro se suits."). That is precisely the case here.

Rush filed his complaint using a generic "Complaint for Judicial Review of Social Security Decision" form, alleging that the Commissioner of Social Security issued a final decision adversely affecting his Social Security benefits. (*See* ECF #1 at 1, Pg. ID 1.) But Rush attached two documents to his complaint showing that the Office has not made a final decision. The first attachment is a "Notice of Hearing" which demonstrates that the Office is not even scheduled to hear Rush's case until October 8, 2015. (*See id.*) The second attachment is Rush's self-addressed email printout in which Rush indicates that the Office has not yet heard his case because the Office "may be Suffering from a minimum of 18 month

Backlog [sic].” (*Id.* at 2, Pg. ID 2.) Based upon the alleged backlog, Rush has moved for a change of venue to this Court. (*Id.*)

Rush asks this Court to take jurisdiction over his claim for benefits even though the Commissioner of Social Security has not yet rendered a decision on his claim. However, the Commissioner of Social Security must have issued a final decision for this Court to have jurisdiction. *See* 42 U.S.C. § 405(g) (“Any individual, *after any final decision of the Commissioner of Social Security* made after a hearing to which he was a party . . . may obtain a review of such decision”) (emphasis added). Because the Office has not made a final decision, this Court does not have jurisdiction over Rush’s claims. Thus, Rush has failed to state a claim and this Court must dismiss this action as frivolous. *See* 28 U.S.C. §§ 1915(e)(2)(B)(i)-(ii).

CONCLUSION

Based on the representations in the Application, **IT IS HEREBY ORDERED THAT** the Application (ECF #2) is **GRANTED. IT IS FURTHER ORDERED** that Rush’s Complaint (ECF #1) is **DISMISSED WITHOUT PREJUDICE.**

s/Matthew F. Leitman
MATTHEW F. LEITMAN
UNITED STATES DISTRICT JUDGE

Dated: September 24, 2015

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on September 24, 2015, by electronic means and/or ordinary mail.

s/Teresa McGovern
in the Absence of Holly Monda
Case Manager
(313) 234-5113